Misdemeanor Voir Dire

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Intro: How to Pick a Jury for a DWI or Other Misdemeanor

There is little to no instruction in law school on picking a jury, so prosecutors must learn on the job. The purpose of this article is to share what I have learned since making it my goal to turn a weakness of mine into a strength.

Picking a misdemeanor jury boils down to four things: 1) making a good impression, 2) finding (and striking) the worst three jurors, 3) getting the jury to see things our way, and 4) getting better through practice and honesty.1 I hope these suggestions are helpful to you, but stick with what you do best and understand your style. Don't try to copy someone else, but take great ideas and incorporate them into your presentation.

Making a Good Impression

The bottom line is that as prosecutors, we are trying to find six people who will do what we ask them to do. And we need to make a good first impression.

Our first impression happens a lot faster than we might think. By the time we say, "Good morning, my name is … " it's already over. Most jurors' understanding of what prosecutors do is portrayed on their favorite television shows. The show that makes the prosecution look the best is "Law & Order," so I try to look as close to the show's prosecutors as I can. I show up early and test any equipment before the jury arrives. I prominently display a PowerPoint slide with my county's seal and the words "Voir Dire" so that the first thing jurors will see is this symbol of authority and order. It tells them what is happening and that they are in the right place. When you begin your presentation on the same screen, jurors will see that you are part of that authority.

Looking professional and organized is part of the "Law & Order" routine. If you have 15 files, a binder, two notepads, and a Starbucks cup on the trial table, you don't look like "Law & Order"; you look like an overworked government employee who had a hard time waking up this morning. Leave these items outside the courtroom or concealed under the desk during voir dire. If you don't want the jury looking at it for an intentional reason, keep it off the table.

It may sound ticky-tack, but clothing matters. I'm a believer in dark, non-pinstripe suits, white shirts, and blue or red ties. (Female prosecutors have more options than their male counterparts but I would be overestimating my own abilities if I tried to give advice on that topic.) I also wear a Texas flag pin on my lapel so the jurors can identify me as the representative of the State of Texas. Nothing is worse than the jurors thinking the State's attorney might be the defendant. In a misdemeanor trial, especially in a DWI, the defendant and prosecutor probably look pretty similar.

Once we have made a good first impression we need to connect with potential jurors. The first step is making them comfortable. So far they have been herded in and out of the courtroom like cattle and have been waiting for a long time. I tell them who I am and that I work for their elected county attorney, then I tell them, "If I were sitting in your shoes right now, I would probably have some questions." Then I show them a slide that you can absolutely steal and works every time. It reads:

> "1) 'Why am I here?' Maybe you're here because you know you can get in trouble for not being here. But there is something inside you that said this process is important to our legal system and our country. Not everybody comes to jury duty but you did. I want to thank you for being here and making this trial possible.
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> "2) 'When can I go home?' You can go home about 5:00 p.m. today. And a lucky six of you can return in the morning.
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> "3) 'What do I have to say to not get picked?' I can't really tell you what to say and what not to say. You just have to tell the truth. But I can tell you that the defense attorney and I get three strikes for almost any reason at all. There is this old saying that those who talk, walk, and those who have nothing to say, stay. The more you say, the more likely you are to say something that either the defense attorney or I do not like. So if you are crossing your arms and scowling at me, please just raise your hand and make sure I make a note of that. It's OK to feel a certain way or dislike something about the process. It's just not OK to feel that way without telling me about it."

I present one bullet at a time and let the jurors read to themselves. I used to read these bullet points out loud but I always get more laughs when I let jurors read them on their own. After the initial chuckle I playfully ask for a show of hands and inquire, "Is anyone thinking these three questions—maybe Questions Two and Three?" The important part is that the jury knows we have been thinking about them and we understand how the process feels from their perspective.

Finding (and Striking) the Worst Three Jurors

Misdemeanor prosecutors get three peremptory strikes, so we must use them wisely.2 So how do you find the worst three jurors? Ask every possible juror a question to hear how each juror responds, and read body language and tone when they answer. Do not end your presentation until you have some gut reaction about every juror in the strike zone.

Any question is better than no questions. Tell them, "You know I haven't heard much from you, Mr. Quiet Juror. What are your thoughts on the laws of Texas?" Sometimes I ask questions without particularly caring what the answer is. In a theft or resisting arrest case, I ask each juror, "What do you like about Texas?" Reasonable people give reasonable answers, while skeptical people say things like, "I like how the government leaves you alone and people stay off

your land." This guy might be nice enough at home, but he just sounds like someone who won't get along with the other jurors. I have also had jurors respond, "I like the fact that people follow the law." Now that is a good State's juror. The other great part of this question is the jurors all say something positive about Texas and then we get to say, "Today, I represent the State of Texas."

There is a great slide on circumstantial evidence involving a little girl getting caught with cake on her face. Ask each juror, "Did she eat the cake?" If they say anything but a quick and easy "yes," move on and mark them down as a no. If I got to ask jurors only one question, I would ask the cake question. Skeptical jurors will invent a friend or a brother who came in and helped the little girl or even say, "Maybe the dog did it." These jurors will make up alternate realities in your case as well. You can use this as an opportunity to tell jurors that they will be restricted to considering only the evidence at the trial, and nobody said anything about a dog or a brother or a friend.

Striking a Juror for Cause

No prosecutor ever lost a case because a juror struck for cause voted not guilty. OK, that is a bit Yogi Berra,3 but it's true. If you can strike a juror for cause, great—just make sure you have a reason for striking him. (For example, in a DWI case, we may want to strike every juror who would absolutely require a breath or blood test.) Though there are many legitimate challenges for cause, the most important for a misdemeanor prosecutor are that the juror has been convicted or is under accusation of theft or a felony, that the juror has a bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction or punishment, and that the juror has already made up his mind as to the defendant's guilt or innocence.4 It's easy to strike a juror because he has a conviction for theft or a felony, or is under an allegation of either (normally presenting this information to the judge in some reliable form will be sufficient), so I will focus on the other two.

Bias or Prejudice

Getting jurors to admit they have a bias or prejudice against the law can be tricky. The law requires that the "bias or prejudice substantially impair [her] ability to carry out [her] oath and instructions in accordance with the law."5 Jurors don't like the words "bias" and "prejudice." They sound like "racist."

The best way to get a juror to admit she is prejudiced or biased in some way is to tell her that it is perfectly normal to feel that way and in fact we all feel that way every day. Bradlee Thornton, another prosecutor in my office, does this effectively by telling jurors about his own biases and prejudices. "Biases and prejudices aren't bad," he tells them. "They are just another way of describing the way we see the world. They reflect our thoughts that we have gained from the experience of our lives. When I was younger I owned a Ford truck that came from the factory with an STX decal and an after-market Sony stereo. It turns out the decal was a giant

advertisement to car burglars that there was a $2,000 stereo only a popped lock away. My truck was broken into over a dozen times. Obviously that experience was extremely frustrating for me. If I was ever called for jury duty on a burglary of a motor vehicle case, the way I looked at the law and the evidence would be affected by my experiences. And that is perfectly reasonable. But another way of saying this is, 'I have a bias or prejudice in that kind of case.'" You can then remind jurors of this story later on if they start feeling uncomfortable admitting they may have a bias against the law.

Conclusion as to Guilt/Innocence

This strike for cause is very technical, and there are two ways to exclude jurors under this provision.6 First, we must ask the juror if he will in fact be influenced by his conclusion as to guilt or innocence. If he says yes, then the judge must strike him for cause at that moment without the opportunity for the defense or even the judge to rehabilitate him. If we haven't talked to the judge about this beforehand, she probably won't follow this rule strictly. It is a pretty harsh rule but if we use this exact language and get the right answer, then we should be on solid legal ground. The second way to excuse someone under this rule is if he is vacillating. Even then if we get him to say something like, "It would be pretty hard to keep it out of my mind but I would try," that may be enough for the judge to decide he is not impartial and strike him.

When questioning a panelist on these matters, remember that if he is not struck for cause, then you may not have enough peremptory strikes to get rid of him. Don't argue with a juror or let it look like you want him off the jury. The best path is to follow your conscience as a prosecutor. You are there to make sure the law is followed. Don't try to word things in a tricky way to get them to jump on the "right" answer. Just ask the correct legal questions and let the chips fall where they may. The judge will appreciate it and so will prospective jurors.

A good prosecution voir dire will also protect strong State's jurors by telling them what the law is with regard to the Fifth Amendment right against self-incrimination and police officer testimony. Normally all it takes to protect a good juror is to let her know which words to use when talking about these typical defense strikes for cause: "Everyone here understands that we would like to hear from the defendant. But you understand that the judge is going to require that you not consider it against him if you don't. You could be fair to the defendant in that way, couldn't you, Mr. State's Juror?" Additionally, "Everyone knows that police get experience and training through their official duties and that can increase their reliability as a witness. But Mr. State's Juror, you would start them off on the same scale as everyone else and would wait until you heard their qualifications before believing what they have to say, right?" These juror-saving strategies are more useful as the offense becomes more heinous. I hardly ever have to go over these things in a DWI case but almost had a panel busted because I skipped over them in a theft voir dire.

Commitment Questions

The law on commitment questions sounds difficult but it really is fairly simple. A commitment question asks a prospective juror to decide an issue in a particular way after being offered a set of facts.

It is proper to ask a commitment question if it relates to an area of the law that the juror would be required to follow during the course of the trial.7 A commitment question that leads to a challenge for cause is proper so long as it does not include more facts than necessary to determine if the juror would follow the law. For example, it is OK to ask, "Can you consider probation for a felony case?" However, it is improper to ask, "Can you consider probation for a felony case involving violence?" The difference is that the latter includes more facts than are necessary to determine if the juror can follow the law.

The best commitment question in a DWI is normally, "If you believed someone lost his normal mental faculties because of alcohol and you believed that beyond a reasonable doubt, would you still require the State to provide scientific evidence of breath or blood alcohol levels before you found someone guilty?" If defense counsel jumps up and screams "Commitment question!" you can simply reply, "Yes, that is exactly right and I am entitled to ask it."

If jurors don't have to follow that law stated in the question, then the question is improper. A question is also improper if the jurors can follow the law without accepting all of the facts offered.

Getting the Jury to See Things Our Way

Prosecutors have been exposed to the criminal justice system for three years of law school and our entire legal career, while jurors normally have absolutely no idea what should or should not be happening. They will follow our lead, so start explaining how to view the legal landscape. This could be as simple as saying, "This is not a complex case. There are only six elements that you need to worry about. And some of them won't even be in dispute."

Don't confuse the jurors with fancy legal mumbo-jumbo—let the defense attorney be the confusing lawyer in the courtroom. The two situations that confuse jurors most are 1) explaining intent, knowledge, and recklessness and their differences, and 2) the DIC–24.

I will go out on a limb to say that no juror has ever understood the difference between intentionally, knowingly, recklessly, and with criminal negligence. I will go out even farther on a limb and say that most jurors don't care because your facts probably very clearly show that the defendant's action was intentional. People don't accidently resist arrest or forget to pay when they leave Wal-Mart with a purse full of clothes. If you try to explain these fine distinctions to the jury, all of a sudden you have become the persnickety lawyer who wants them to focus on legal minutia instead of just common sense. My suggestion is not to even try—let defense

counsel stand up and explain intent if he wants to. Remember that the judge will go over it in the jury charge, too. And we can remind the jury in closing argument, "Look, ladies and gentlemen, all you have to know about intent in this case is laid out in the evidence and the testimony."

The other area where you can avoid confusing the jury with "lawyer talk" is covering the DIC–24. Some prosecutors, even very successful ones, argue that when you refuse a breath test or blood test after reading the DIC–24, that means the defendant wanted to hide her alcohol concentration so badly that she was willing to give up her driver's license. Any good defense attorney is going to counter with, "Well, this is a complex legal form. If she could make that choice, it means my client had her mental faculties." The defense lawyer is right: The DIC–24 is a complex legal form. Nobody understands it the first time they read it. But we should not focus on the complexity of the DIC–24—rather, tout its simplicity.

I tell the jurors, "Look, here is the DIC–24. It's a bunch of legalese written by the legislature. But right here at the end is a very simple question: 'I am now requesting a specimen of your [ ] breath or [ ] blood.' The only thing running through the defendant's mind is, 'I've been arrested for DWI and I'm drunk.' When he refuses without hesitation he is doing so only to conceal evidence from you." Remind the jurors that they can absolutely use refusal as evidence against the defendant proving intoxication.

The jury won't know that they can use certain pieces of evidence unless you tell them the judge says it's OK. When you avoid confusing the jury, they start to trust in what you say because they understand each part.

Get Better Through Practice and Honesty

Our final objective of voir dire is to educate ourselves. If we aren't trying to get better, then we are getting worse. If your judge will talk to you about your voir dire, then ask for his honest critique. There is always something we can do better, even if the jury came back with a guilty verdict in 15 minutes.

Also, there is no substitute for experience. You can know something to be true but not really believe it until it happens to you. For example, I knew about the importance of primacy and recency, which is the theory that jurors remember the first thing they hear and the most recent thing they heard. But when I first started out as a lawyer and gave a voir dire presentation, jurors seemed to be listening to and understanding the entire presentation, and I neglected primacy and recency—but time after time jurors forgot things that happened in the middle. Primacy and recency were no longer a theory I knew about but rather a lesson I'd learned (the hard way).

Some of the best experience and feedback we can get comes from practicing voir dire on non-lawyers. They don't look at the world the way we do. I practice on my office's court secretaries and my in-laws. Keep a laptop with your presentation handy and practice it on people

who haven't seen it before. Ask them to explain the definition of intoxication back to you after you are done. This is something you can't do with a jury for fear of making someone look or feel stupid—in front of a group nobody is going to admit that they didn't understand what you just said. In a one-on-one environment, a court secretary or mother-in-law won't feel that pressure. (Use discretion with the mother-in-law.) This will help you practice reading confusion on people's faces without their speaking up.

New prosecutors always talk to the jurors after the verdict. If it is a guilty verdict, then everything the State did was golden sunshine and the defense attorney was "just doing his job" or "didn't have a lot to work with." But jurors who vote not guilty will have endless excuses for the defendant. My piece of advice is to talk to jurors about the trial and ask open-ended questions about broad topics, but don't necessarily take their advice to heart. Don't change something that worked because they said they didn't care about it. We have to start looking past their words and find out what they are actually telling us about our performance. When you start getting strange answers after a not-guilty verdict, you may be quick to label that jury as unreasonable, but don't let yourself fall into that trap. Those jurors stopped looking at the case from your perspective or lost trust in the State at some point during the trial. The reasons they are giving are just what they came up with to justify doing what they wanted to do.

Conclusion

I hope this article has offered some suggestions that you find helpful. If nothing else, perhaps the best point to make is that we, as prosecutors, are trying to do four things during voir dire: 1) make a good impression, 2) find (and strike) the worst three jurors, 3) get the jury to see things our way, and 4) get better through practice and honesty.

Endnotes

1. The Court of Criminal Appeals says there are three possible purposes for voir dire:? asking questions to challenge for cause, asking questions to use peremptory challenges, and "not necessarily a legally legitimate one is to indoctrinate the jurors on the party's theory of the case and to establish rapport …" Sanchez v. State, 165 S.W.3d 707, 710-11 (Tex. Crim. App. 2005).

2. Peremptory strikes in misdemeanors are limited to three per side or with multiple defendants, three per defendant. That is, unless you are trying your misdemeanor in district court, then you get five strikes or three per multiple defendant. Tex. Code Crim. Proc. art. 35.15.

3. Yogi Berra is a famous baseball player who coined phrases that are often tautologies. For example, "It ain't over till it's over."

4. Tex. Code Crim. Proc. art. 35.16 (a)(2), (3), (9), and (10).

5. Feldman v. State, 71 S.W.3d 738, 744 (Tex. Crim. App. 2002).

6. Tex. Code Crim. Proc. art. 35.16 (a)(10).

7. Standefer v. State, 59 S.W.3d 177 (Tex. Crim. App. 2001).